

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP718

Cir. Ct. No. 2012SC49

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ZEITLER PLUMBING & SEPTIC SERVICE, INC.,

PLAINTIFF-RESPONDENT,

V.

**GREVE CONSTRUCTION, INC., JACKI BOLLENDORF
AND JAMI MURRAY,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Menominee County: JAMES R. HABECK, Judge. *Reversed and cause remanded for further proceedings.*

¶1 MANGERSON, J.¹ Greve Construction, Inc., Jacki Bollendorf, and Jami Murray (collectively, Greve) appeal a small claims judgment in favor of

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Zeitler Plumbing & Septic Service, Inc. Greve argues the circuit court erroneously exercised its discretion by making factual findings and limiting evidence consistent with those findings before Greve presented its defense. Greve also argues the circuit court's factual findings are clearly erroneous. We conclude the circuit court's ultimate factual determination is erroneous, the court erred by making a factual finding mid-trial, and the errors are not harmless. We therefore reverse and remand for a new small claims hearing.

BACKGROUND

¶2 Zeitler brought a small claims action against Greve for an unpaid portion of a bill resulting from plumbing work that Zeitler completed on Greve's new home construction. Greve disputed Zeitler's claim, and a small claims trial was scheduled.

¶3 At trial, Edward Zeitler testified that in August 2011, he prepared a proposal to complete interior plumbing on a new home James Greve was constructing. The proposal stated Zeitler would complete the work for a fixed price of \$12,073, and Greve would pay Zeitler one-third of the fixed price when Zeitler completed the groundwork, one-third when he completed the rough in, and the remaining one-third when the project was completed. It also provided that "proposal prices [are] honored for 6 months. Remainder of job billed at T&M [time and materials] after 6 months from proposal date."

¶4 Zeitler testified that Greve signed and returned the proposal on September 5, 2011.² Zeitler explained that on November 7, 2011, Greve contacted Zeitler and asked to switch the project from a fixed-price to a time and materials basis. According to Zeitler, Greve wanted to change to time and materials because Greve wanted the ability to make modifications as the job progressed and Greve believed it would be less expensive to proceed on a time and materials basis. Zeitler agreed to bill the project on a time and materials basis.

¶5 Zeitler began working on the project on November 28, 2011. Zeitler testified that Greve kept changing his mind about whether he wanted the project billed on a fixed-price or a time and materials basis. Zeitler issued the first bill to Greve pursuant to the fixed-price contract, and the bill represented the first one-third payment. Zeitler testified Greve paid that bill, but wanted the next bill to be issued on a time and materials basis.³

¶6 Zeitler issued another invoice to Greve on January 31, 2012. This invoice was billed on a time and materials basis. According to Zeitler, Greve was unhappy with this bill and alleged that Zeitler had padded the bill and overcharged him. Zeitler explained the bill was more than Greve anticipated because Greve “failed to remember the extras that he had in the house.” Greve paid this bill in

² We observe Zeitler later testified that he never received a copy of Greve’s signed September 5, 2011 proposal. Zeitler explained he had Greve re-sign the proposal when Greve paid his first invoice. However, Zeitler produced the signed September 5, 2011 proposal at trial.

³ Although Zeitler testified about this invoice and that it was paid in full, we question whether this invoice truly exists. It was the only invoice not admitted into evidence at trial, and the January 31, 2012 invoice, which Zeitler testified was the second invoice he issued, represented work completed from *the start date* of the project to January 31, 2012. Further, Greve testified the first invoice he received was the January 31, 2012 invoice. If Greve indeed paid the first one-third of the contract price before he paid the January 31, 2012 invoice, it is likely that he would have testified to that effect.

full. However, Zeitler testified that Greve re-signed the proposal for the contract price and they agreed to do contract pricing.

¶7 After working on the house on January 31, Zeitler next worked on the house on May 9. On May 14, 2012, Zeitler issued another invoice to Greve in the amount of \$6,858.66. This amount represented the first two-thirds of the fixed-price contract minus a credit for groundwork completed by a different contractor. Zeitler testified Greve did not pay this bill.

¶8 On September 4, 2012, Zeitler issued another bill to Greve on a time and materials basis. Zeitler explained that, irrespective of any change in the method of billing, the September 4 bill was properly billed on a time and materials basis because it had been more than six months since the August 2011 proposal price. The bill was for \$5,615.69 and Greve paid \$2,218.52, leaving a balance of \$3,397.17, which was the amount Zeitler sought in the small claims action. Zeitler testified the project was eighty-five or ninety percent complete.

¶9 Greve's version of events differed dramatically from Zeitler's. According to Greve, he never requested that the contract be modified from fixed-price to time and materials. However, before Greve could present his entire version of events and while Greve was cross-examining Zeitler, the circuit court found the parties had negotiations after entering into the contract and ultimately changed the billing method to time and materials. When Greve tried to establish his version of events—that the agreement never changed, the court repeatedly intervened and told Greve that he was on a time and materials basis and needed, instead, to prove the agreement changed back to a fixed price. Eventually, the

court became frustrated with Greve and determined he could no longer cross-examine Zeitler.⁴

¶10 Nevertheless, when Greve testified, he maintained the January 31, 2012 invoice was improperly billed on a time and materials basis. Greve explained he met with Zeitler on March 5, 2012 to discuss the January 31 invoice. According to Greve, Zeitler explained he billed Greve on a time and materials basis because Zeitler never received a copy of Greve's September 5 signed proposal and therefore Zeitler began working on a time and materials basis.

¶11 Greve told Zeitler that, even on a time and materials basis, the invoice was inaccurate because Zeitler billed Greve for work that Zeitler did not do and for work that had not yet been done. Zeitler told Greve that his concerns about inaccuracies in the time and materials invoice did not matter because Zeitler would do the fixed-price contract with Greve. Zeitler then had Greve re-sign the proposal for the contract pricing.

¶12 At the end of the March 5 meeting, Greve paid the January 31 invoice in full. He testified that, although the bill was in excess of what the first one-third payment should have been, Greve assumed that when the next, one-third payment was due, Zeitler would give him a credit for the overpayment.

¶13 Greve agreed that Zeitler did not work on the project again until May 9, 2012. On May 14, 2012, Zeitler issued an invoice to Greve in the amount of \$6,858.66. This invoice represented the first two-third payments of the contract

⁴ We understand the circuit court's frustration. The record reveals the parties were hostile toward each other and continuously failed to maintain proper courtroom decorum.

price—for completion of the groundwork and rough in—minus a \$1,190 credit for groundwork completed by another contractor. Greve testified he did not pay this bill because: (1) the January 31 bill was for groundwork completion and he had already paid that bill, and (2) Zeitler had not yet completed the rough in and was therefore not entitled to the second one-third payment. Greve explained that when he contacted Zeitler, Zeitler told him to disregard the bill and the rough in would be completed by the next billing cycle.

¶14 On September 4, 2012, Zeitler issued an invoice to Greve in the amount of \$5,615.69 that was billed on a time and materials basis. Greve testified this bill was incorrect because it was supposed to be the second one-third amount. In any event, Greve also testified that the time and materials bill itself was inaccurate because Zeitler had again overbilled labor, had billed him for items that Zeitler’s workers had to redo because they were done incorrectly and did not pass inspection, and had billed him for items Zeitler’s workers broke and had to replace. Greve testified that, when he received the bill, the project was two-thirds complete and therefore he paid \$2,218.52 of the bill.

¶15 However, when Greve tried to explain to the court that he reached the \$2,218.52 number by subtracting \$4,640.14—the amount he paid for the January 31 invoice—from \$6,858.66—the amount of Zeitler’s May 14 bill, which represented the first two-thirds of the contract amount less a credit for work completed by another contractor, the court interrupted Greve, stating that the May 14 bill was “irrelevant” because “[W]e have already established that you did not pay that.” When Greve again tried to explain why he did not pay the May 14 bill, the court told him to cease testifying and directed him off the witness stand.

¶16 Further, throughout the course of Greve's testimony, the court repeatedly told Greve that it only wanted to know how Greve came up with the \$2,218.52 amount. The court told Greve, "You have to show me what you think was wrong about their time and materials billing and how you came to your numbers so I understand how you did it. And you have to do it now Don't talk to me about these other things."

¶17 Ultimately, the circuit court stated the January 31 invoice was billed and paid on a time and materials basis. It then found that, on May 14, Zeitler billed Greve pursuant to the contract for the *remaining* two-thirds of the project. The court reasoned that, because Greve did not pay the remaining contract amount, Zeitler billed Greve on September 4 on a time and materials basis for the work Zeitler actually completed. The court ruled in favor of Zeitler and ordered Greve to pay the remainder of the September 4 bill, or \$3,497.17. Greve appeals.

DISCUSSION

¶18 On appeal, Greve argues the circuit court erroneously exercised its discretion by making factual findings and limiting evidence consistent with those findings before Greve presented his defense. He also argues the circuit court's factual determination that the parties agreed to a time and materials basis is clearly erroneous. Zeitler responds the circuit court did not erroneously exercise its discretion, its factual findings are supported by the record, and, in the event there is any error, the error is harmless.

¶19 "A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record." *260 N. 12th St., LLC v. DOT*, 2011 WI 103, ¶38, 338 Wis. 2d 34, 808 N.W.2d 372. Further, "[a] circuit court's factual findings will not be set aside

unless they are clearly erroneous.” WIS. STAT. § 805.17(2). “[A] finding of fact is clearly erroneous when ‘it is against the great weight and clear preponderance of the evidence.’” *Phelps v. Physicians Ins. Co. of Wis., Inc.*, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615 (quoted source omitted).

¶20 At the outset, irrespective of any fixed price or time and materials billing discrepancy, we conclude the circuit court’s ultimate factual determination is clearly erroneous. Specifically, the circuit court found the May 14 invoice represented the *remaining* two-thirds of the contract price. It concluded that when Greve did not pay the May 14 invoice, Zeitler simply invoiced him on September 4, on a time and materials basis, for the work he actually completed. The court noted it could not understand why Greve was disputing the September 4 bill because he was paying less than what he would have paid under the May 14 bill.

¶21 The court’s determination, however, is unsupported by the record. The May 14 invoice explicitly states the bill is for the groundwork and rough in, which under the original contract represents the first two-thirds of the fixed-price contract. No one testified the May 14 invoice represented the remaining two-thirds of the fixed-price contract. Further, pursuant to the fixed-price contract, Zeitler was not entitled to the last one-third payment until the project was complete. Therefore, assuming the parties were under the fixed-price contract on May 14, Zeitler could not have billed for the last one-third amount because it is undisputed that the project remained incomplete.

¶22 That being said, simply because the circuit court’s ultimate factual determination is clearly erroneous does not necessarily mean we must reverse. We may nevertheless affirm if the circuit court reached the right result for the

wrong reason. See *State v. King*, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984).

¶23 To determine whether Zeitler was entitled to the balance of the unpaid portion of the September 4 bill, the circuit court first needed to determine the nature of the parties' agreement when Greve paid the January 31 bill. This finding is important because if the parties were under a fixed-price agreement at that time, it is undisputed that Greve paid more than the first one-third amount, and, therefore, Greve would be entitled to an offset on a future bill. However, if the parties were under a time and materials agreement at that time, Greve would receive no offset on a future bill.

¶24 Here, the circuit court determined that when Greve paid the January 31 bill, the parties were under a time and materials agreement. Greve argues this finding is clearly erroneous because the circuit court made this finding mid-trial, before Greve had an opportunity to explain why the parties were still subject to the fixed-price agreement. We agree.⁵ See *Lucareli v. Vilas Cnty.*, 2000 WI App 157, ¶11, 238 Wis. 2d 84, 616 N.W.2d 153 (litigant must be given meaningful opportunity to present a defense). The court's premature factual determination hindered Greve's ability to present his version of events and caused significant frustration between the court and Greve when, despite the court's factual determination, Greve continued to try to prove that he and Zeitler remained under a fixed-price agreement. We conclude the court erroneously exercised its discretion by making a premature factual determination and this determination

⁵ We also observe the record citation Zeitler provides for the circuit court's determination that the parties agreed to change the billing to a time and materials basis occurs mid-trial, before Greve's testimony.

significantly affected Greve's ability to present a defense. Consequently, Greve is entitled to a new trial.

¶25 Zeitler, however, argues any error is harmless. He asserts that, because the contract price expired in February 2012, which was six months after the August 2011 proposal, Zeitler's September 4, 2012 invoice was properly billed on a time and materials basis and Greve is obligated to pay the bill in full.

¶26 We disagree. Even assuming the parties were properly under a time and materials billing agreement on September 4, 2012,⁶ Zeitler's argument ignores that, if the circuit court finds on remand that the parties were under a fixed-price contract on January 31, 2012, Greve paid more than the first one-third amount and therefore would be entitled to a credit on the September 4 bill. Accordingly, any error is not harmless.

¶27 Because we conclude that the circuit court's ultimate factual finding is erroneous, the court erred by making a factual determination mid-trial, and that any error is not harmless, we reverse and remand for a new trial.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁶ We note that Greve testified the parties met in March 2012 and agreed to adhere to the fixed-price contract for the remainder of the project. Therefore, a factual determination will need to be made as to whether the parties were under a time and materials or fixed-price agreement at the time of the September 4, 2012 invoice.

